SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No.

WILLIAM M. MITCHELL, ADMINISTRATOR
OF THE ESTATE OF KIT C. KOGER,
PETITIONER, AND APPELLEE BELOW

v.

NEW ENGLAND MUTUAL LIFE INSURANCE
COMPANY, RESPONDENT, AND APPELLANT BELOW

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

Opinions of Courts Below

The opinion in the United States Circuit Court of Appeals is reported in 118 Federal (2d) 414. The opinion of the United States District Court for the Western District of Virginia is reported in Fed. Sup. .

II.

Jurisdiction.

1. The date of the judgment to be reviewed is the 10th day of March, 1941, as appears from page 24 of the record.

2. The statutory provision which is believed to sustain the jurisdiction of this Court is Title 28, U. S. C. A., Section 347.

3. The cases believed to sustain said jurisdiction are as follows:

Magnum Import Co. v. *Coty*, 262 U. S. 159;

Southern Power Co. v. *North Carolina Public Service Co.*, 263 U. S. 508;

Keller v. *Adams-Campbell Co.*, 264 U. S. 314;

Layne & Bowler Corp. v. *Western Well Works*, 261 U. S. 387;

Webster Electric Co. v. *Splitdorf Electric Co.*, 264 U. S. 463.

III.

Statement of the Case.

The case has already been stated in the preceding petition filed herewith and this statement is hereby adopted and made a part of this brief.

IV.

Specification of Errors.

1. The United States Circuit Court of Appeals erred in holding that suicide of respondent's intestate within two years after issue of the life insurance policies in question but more than one year after issue of said policies is available to the respondent as a defense to an action on said policies.

V.

ARGUMENT.

Summary of the Argument.

Point A.—It is the settled law of Virginia (in which state this action arose) that the suicide of the insured more than

one year after the date of the issue of a policy of life insurance is not a defense to an action on a policy such as is here in question because the language of the policies does not limit liability or exclude the risk of suicide, but works a forfeiture for the breach of a condition subsequent, and, therefore, is a contest within the meaning of Section 4228 of the Code of Virginia. For this reason suicide is not available to the insurer as a defense to this action. United Security Life Insurance and Trust Company v. Massey, (1932, 1933) 159 Va. 832, 164 S. E. 529, 167 S. E. 248, 85 A. L. R. 306.

Point B.—The decision of the Circuit Court of Appeals in this case is in conflict with a decision of the Circuit Court of Appeals for the Eighth Circuit in Badger v. Hoidale, (C. C. A. 8; 1937) 88 Fed. (2d) 208, 109 A. L. R. 798, in that in the present case considered dictum of the Supreme Court of Appeals of Virginia was ignored by the Circuit Court of Appeals for the Fourth Circuit when it was attempting to construe or ascertain the meaning of the law of Virginia.

Point C.—The decision of the Circuit Court of Appeals in the present case is in conflict with the decision of the Supreme Court of the United States in Hawks v. Hamill, (1933) 288 U. S. 52, 53 S. C. R. 240, 77 L. Ed. 610, in that the Circuit Court of Appeals for the Fourth Circuit has in the present case refused to give deference to the decision of the Supreme Court of Appeals of Virginia in United Security Life Insurance and Trust Company v. Massey, supra, which at least amounts to "considered dictum and not comment merely obiter".

Point D.—The decision of the Circuit Court of Appeals in the present case ignores and refuses to follow the mandate of the Supreme Court of the United States in West v. American Telephone & Telegraph Company (1940) U. S. , 61 S. C. R. 179, 85 L. Ed. (Adv. Opinions) 147, to the effect, "that it is the duty of" a Federal court in cases where jurisdiction rests exclusively on diversity of citizen-

ship "to ascertain from all available data what the state law is and apply it rather than to prescribe a different rule however superior it may appear from the viewpoint of general law".

Point E.—In any event it is desirable that the Supreme Court of the United States shall determine (if it has not already determined) the extent to which a Federal court in determining questions of local law is bound by considered dicta of local courts and to what extent such Federal courts may rely upon such considered dicta as available data for the purpose of determining local law.

POINT A.

Under the law of Virginia suicide is not available to the insurer as a defense to this action.

The question of law involved under this point was squarely presented by the pleadings in this case and the District Court in which this cause originated decided that question squarely in accordance with our contention. In other words, the trial court held in a well considered opinion that under the law of Virginia the defense of suicide is not available to an insurance company in an action brought by insured's administrator on a policy of life insurance which has been in effect for more than one year prior to the alleged suicide and which contains the suicide and incontestable clauses set out in the summary statement of the matter involved in this case which is included in the petition for the writ of certiorari. (R. 13). Section 4228 of the Code of Virginia which is the applicable statute has also been set out in full in our petition. (R. 14).

The trial court aptly summarizes its view of the legal question involved in the following language:

> "The statute, Section 4228, begins by declaring that in this State suicide shall constitute no defense to a life insurance policy, with the proviso that an insurance company may to some extent protect itself from this

enactment by ' . . . an express provision in the body of such policy limiting the liability of the insurer . . . ' The express provision of the policy here in a suit, in terms, is not a limitation of liability, but a forfeiture of all rights under the policy coupled with a provision for the return of premiums. It is a well established rule in Virginia that in actions on insurance policies, the insured should be protected by every proper presumption, it being the policy of the courts to uphold such contracts when it can be in good conscience done. *Flannagan* v. *Mutual Insurance Co.*, 152 Va. 38, 73. Therefore, it seems to me that there is no burden upon the policyholder's estate to show that the express provision in the policy is less favorable to him than the express provision authorized by statute. *In order to bring itself within the proviso of the statute, it was incumbent upon the insurance company to comply with the terms therein imposed; and as in this instance the insurance company failed so to do,* I am of the opinion that the suicide clause in defendant's policy must fail because it does not comply with the provisions of Section 4228, and therefore suicide is no defense to this action because of the other provisions of Section 4228 and the incontestable clause in the policy." (R. 19)

Is not this reasoning sound? The General Assembly of Virginia lays down a general rule that in an action on a life insurance policy "it shall be no defense that the insured committed suicide." It then provides that the insurer has a means of escape from this general rule (for a limited time) if it will write "*an express provision* in the body of such policy *limiting the liability of the insurer*". Is it asking too much of the insurer to insist that if it does not wish to be bound by the general rule, then it is incumbent upon it to comply with the plain terms of the statute in order to bring itself within the exception? If it does not choose to follow the language of the statute, then by a cardinal rule of construction of insurance contracts, the language which it does use if susceptible of two constructions, should be construed against the insurer. *Ayers* v. *Harleysville Mutual Cas. Co.* (1939) 172 Va. 383, 2 S. E. (2) 303.

The Circuit Court of Appeals reversed the Trial Court because in its opinion the provision of the policy to the effect that it should "be void and shall have no value" in the case of suicide has the same effect as "a provision that suicide is not a risk covered by the policy or that liability under the policy shall not extend to suicide". (R. 26).

The Doctrine of United Security Life Insurance and Trust Company V. Massey

Which of these two conflicting decisions is correct depends upon the proper interpretation of *United Security Life Insurance and Trust Company* v. *Massey*, (1932, 1933) 159 Va. 832, 164 S. E. 529, 167 S. E. 248, 85 A. L. R. 306. It is our contention that the District Court correctly construed the Massey case and the Circuit Court of Appeals ignored it. We make three contentions with respect to the Massey case as follows:

(a) The language and conclusions of the court with respect to the defense of suicide to an action on a life insurance policy are not dicta.

(b) Even if such language and conclusions may be called dicta they are considered dicta and entitled to the respect of Federal courts sitting in diversity of citizenship cases.

(c) Such language and conclusions at least constitute "available data as to what is the law of Virginia" and, therefore, "it is the duty of the Federal courts" to accept it and apply it though some other rule may appear to such Federal courts to be superior thereto.

What is the Decision in the Massey Case?

In *United Security Life Insurance Co.* v. *Massey*, supra, the facts are thus stated in the opinion:

> "On the 24th day of October, 1927, Charles O. Proctor made application to the United Security Life

Insurance and Trust Company of Pennsylvania, appellant, for a fifteen year endowment life insurance contract, and on the 10th day of November, 1927, pursuant thereto, the company entered into an insurance contract with him, which was, in form, rather unusual and unique. It was, however, its accustomed method of business with its insured. The face value of the policy or contract was $5,000.00, which amount was at once advanced to Proctor, and which he was to repay to the company in monthly payment of $51.75 for fifteen years, if he should live that long, otherwise, only so long as he lived. To secure the monthly payments Proctor executed a bond in the penalty of $10,000.00 and a deed of trust on his real estate in the city of Newport News. The contract of insurance provided that if Proctor died within the fifteen year period, its terms having been kept and performed by him, the company would release the deed of trust and return the bond to the wife of the assured, or anyone claiming under or through them.

"In the application for the insurance Proctor stated that he was, at the time, a lawyer and that previously he was a conductor for the Chesapeake and Ohio Railway Company. Embodied in the application was the warrant and agreement, among other things, that if he should, at any time, die 'in service on any railway train', without the written consent of the insurance company so to be engaged, any agreement under the application should thereupon become null and void, and that the application should be the basis of the contract and regarded as a part thereof, if and when the same was put into force." (159 Va. 836, 837)

The application for the policy contains the following language: "I hereby warrant and agree, that . . . if, within two years from the date of the agreement, I shall die by my own hand or act, whether sane or insane, or at any time shall die . . . in service on any railway train . . . any agreement under this application shall thereupon

become null and void, and that the statements and answers to the printed questions above, together with this declaration, . . . are full, complete and true, that they shall constitute the application, and be made the basis of this contract and shall be regarded as a part of the contract." (159 Va. 837, 838).

The policy itself carried the following provisions: "That during the aforesaid term of years (the life of the policy) the said party of the first part (the insured) shall not, without the written consent of the said party of the second part (the insurer) . . . be personally engaged . . . in service on any railway train." (159 Va. 838, 839). There was a further policy provision "That in case any of the statements or declarations made in the above-mentioned application are untrue; or in case of the violation by the said party of the first part of any of the above covenants, promises and agreements on . . . part to be kept and performed; or in case of the death of the said party of the first part by his own hand or act, whether sane or insane, within two years from the date hereof . . . then the above-mentioned bond shall at once at the option of the party of the second part, become due and payable, etc." (159 Va. 839)

The Court continues its statement of facts as follows:

> "Charles A. Proctor was killed on the 29th of March, 1929, by being accidentally run over by a Chesapeake and Ohio Railway train, on the railroad yards in the city of Newport News, Virginia, while he was acting as a conductor or brakeman on the train being operated on the yards.
>
> "Ruby O. Proctor, widow of the deceased, and one of the appellees, demanded the return of the bond and the cancellation or release of the deed of trust which was refused by the appellant, the insurance company, because the assured had allegedly broken his covenant not to become engaged in railway service and had met his death while engaged in an excepted occupation.

"In November, 1929, the appellant instituted a chancery suit against the administrators and heirs at law of the assured for cancellation of the insurance agreement, in which the defenses already referred to were asserted. The defendants, appellees here, filed answers to the original and amended bills and interposed demurrers thereto, and the case was heard upon the issues joined and the court sustained the demurrers and dismissed the bills. Upon this action of the trial court the case is before us." (159 Va. 839)

The opinion then states the issue and respective contention in this manner:

"It is conceded that the sole issue on this appeal and therefore the single question for our determination is the construction of Section 4228 of the Code of Virginia, in its relation, if any, to the case.

"The insurance company, appellant, contends that the action taken by it is not a contest of the policy but is really an insistence upon its terms; that the action of the trial court amounted to an abrogation of the express provisions of the contract of insurance because the death of the assured was occasioned by a hazard or risk which was not covered by the policy but which was explicitly excepted therefrom.

"It is the contention of the appellees that the statute is applicable to this case and that its terms preclude the right of the insurance company to invoke the provisions of the policy in its behalf, for any cause, after the death of the assured, save for such cause or causes as are embraced in the exceptions stated in the statute." (159 Va. 840)

In the course of its opinion by Mr. Justice Browning handed down on June 16, 1932, the Court says:

"(2) In the case in judgment the insurer and the insured, undoubtedly, had the right to contract as they

did, in the absence of any statutory provision to the contrary, provided their obligations were consistent with public policy. With these inhabitions the insurance company had the right to limit its liability. The terms of the policy amounted in plain and unambiguous terms to those contemplating the protection of insurance that the issuing company would not assume the risks incident to the hazardous occupation of service on railroad trains." (159 Va. 842-843)

There are then discussed or cited every case cited by the respondent (in its brief in the Circuit Court of Appeals) except *Moore* v. *Bankers Credit Life Insurance Company*, (1931) 223 Ala. 373, 136 So. 798. After reviewing these cases the opinion says:

"(4) It is said by some of the text-writers and annotators that there is a conflict of authority upon the principles enunciated in the cases cited, and this is true, but we think that the weight of reason, right and logic is with the contention that there is no inconsistency between the Virginia incontestable statutory provision and the excepted risk provision in the policy in the case in judgment. The incontestable provision 'is not a mandate as to coverage, a definition of the hazards to be borne by the insurer'.

"The policy in question limited its coverage by excepting from its operation and effect the assured, if he should engage in service on a railroad train. The engagement in such service *ipso facto* put him outside the folds of its protection.

"Charles A. Proctor violated his warranty by engaging in such service and thereby lost his life. He was a voluntary stipulator to refrain from doing that which would at once deprive him of insurance security, in the absence of something done or left undone by the company which would parry this effect. As to this latter we cannot say on the issue developed by the demurrer.

"The hazards of railway service were never assumed by the company because they were expressly excepted." (159 Va. 848)

Finally the Court's holding is as follows:

"We hold that the action taken by the appellant is not a contest of the policy, in the meaning of the statute; that the risk taken by Charles A. Proctor, in engaging in the railroad service which resulted in his death, was without the coverage of the policy, that the company did not insure his life against such hazard; and that the trial court erred in sustaining the demurrer.

"(9) It is perfectly plain that an insurance company is not liable for a loss not covered by its policy. To use an extreme illustration, if one were to die after the expiration of a term policy there would be no liability, and a company which undertook to defeat an attempt to saddle upon it a loss would not be contesting it. To use another illustration, if it were to declare that death due to an accident in an airplane was not covered, there could be no liability for such a loss, and a denial of liability would not constitute a contest. But it is also plain that if liability were denied because of some condition subsequent broken, that would be a contest within the purview of Code, section 4228, as amended by Acts 1926, c. 205. *Whitfield* v. *Aetna Life Ins. Co.*, 205 U. S. 489, 501, 27 S. Ct. 578, 51 L. Ed. 895, 898." (159 Va. 849, 850).

It will be observed that the contention of the company was precisely that of the respondent here, to-wit, that the "action taken by it is not a contest of the policy but is really an insistence upon its terms . . . because the death of the assured was occasioned by a hazard or risk which was not covered by the policy but which was explicitly excepted therefrom."

It will be observed that the Court had to construe Section 4228 of the Code of Virginia, which is the same section we

rely upon. There is this distinction: It did not have to consider whether the company had complied with the statute so as to avoid the general declaration of policy by limiting the company's liability in the event of suicide. Section 4228 insofar as it is material was with one exception in the same language as it now appears. In 1932 the General Assembly extended the time within which the company might limit its liability as to suicide from one year to two years.

It will be observed that the warranty against suicide and against service on any railway train appear in the same paragraph of the application. Moreover the provisions in the policy working a forfeiture of insured's rights in the event of suicide or service on a railway train are contained in the same paragraph and are on equal footing.

The unanimous conclusion of the Virginia Court in its first opinion was that both provisions (as to suicide and service on railway trains) were identical in purpose and effect and therefore that the company had excluded both from the coverage of the insurance as a risk not assumed. The Court held that the policy in question had excluded from the coverage an insured who engaged in service on any railway train, and therefore the action of the company was not a contest within the terms of Section 4228.

The opinion of the Circuit Court of Appeals of which we complain is in full accord with the first decision of the Virginia Supreme Court in the *Massey case.* The first Virginia decision as quoted above stated, "The policy in question limited its coverage by excepting from its operation and effect the assured, if he should engage in service on a railroad train. The engagement in such service *ipso facto* put him outside the folds of its protection. The hazards of railway service were never assumed by the company because they were expressly excepted". (159 Va. 848)

Again, we call to the attention of the Court an excerpt from the first opinion in the *Massey case:*

"We hold that the action taken by the appellant is not a contest of the policy, in the meaning of the statute; that the risk taken by Charles A. Proctor, in engaging in the railroad service which resulted in his death, was without the coverage of the policy; that the company did not insure his life against such hazard; and that the trial court erred in sustaining the demurrer.

"(9) It is perfectly plain that an insurance company is not liable for a loss not covered by its policy." (159 Va. 849)

Now we quote from Judge Parker's opinion in the present case:

"The contention that the suicide clause here is a mere condition subsequent, breach of which may avoid the policy but which does not amount to a limitation of liability, will not bear analysis. The clause relates, not to matters effecting the risk, but to the risk itself. Breach of a condition subsequent avoids the policy so that it no longer covers the risk insured against; but where a life policy contains a suicide clause, suicide is simply not a risk insured against in the first instance. A life policy promises payment in case of death; and the office of the suicide clause in such a policy is to except death by suicide from that promise. It is clear, therefore, that the suicide clause, whether it provides that the policy shall be void in case of suicide or that suicide is not a risk covered, is necessarily a limitation on coverage. Its effect is to except death by suicide from the promise to pay the amount of the policy in case of death." (R. 29).

It will thus be seen that the opinion of the Circuit Court of Appeals and the first Massey opinion are in entire agreement.

But, unfortunately for respondent's contention, there was a rehearing in the Massey case and the Virginia Su-

preme Court of Appeals reversed itself and in the second opinion - - holds that "an insurance company is not liable for a loss not covered by its policy", but that

> "(12) Here the policy is a flat contract of insurance. In its inception no exceptions appear upon its face, and if defeated it must be, not because of original reservations, but because of some covenant broken. The latter possibility is one which the statute was designed to meet." (159 Va. 853)

In reaching this conclusion the Court clearly distinguishes between the effect of the language used in the policies here in question; to-wit in the event of suicide "this policy shall be void and shall have no value" and the language used in the policies involved in most of the cases cited by the Virginia Court; to-wit suicide "is not a risk assumed" under this policy. The Virginia Court saw a sharp difference as appears from its comment on the distinction between a Minnesota case and a Michigan case as follows:

> "In *Bowman* v. *Surety Fund Life Ins. Co.* 149 Minn. 118, 182 N. W. 991, 992, the policy contains this provision: 'This policy shall be void if the insured shall engage in army or navy service in time of war without the written consent of the company, or shall become intemperate in the use of intoxicating liquors, chloral, cocaine or opium to the extent to impair the health of the insured.' The insured, without such written permission, went into military service and was killed in battle. That court held that it was dealing with a condition broken, and distinguished it from *Ruddock* v. *Detroit Life Ins. Co.*, 209 Mich. 638, 177 N. W. 242, 243, which dealt with this provision: '*** Military or naval service in time of war is not a risk assumed under any policy hereunder applied for ***.' In the one case there never was coverage; in the other there was complete coverage in the beginning. The defense was a condition subsequent broken. *Forfeitures defeat an existing right, but a right which never existed can never be forfeited, and this is the distinction*

between those policies which declare that certain risks are not assumed and those which declare that they may be defeated by some subsequent happening." (159 Va. 852, 853.) (The italics are ours.)

The Virginia Court in its consideration of the proper construction of Section 4228 of the Code of Virginia reviewed many insurance cases dealing with suicide and incontestable clauses. Most significant to this case is this language of the Court:

"Judge Cardozo, in commenting upon *Northwestern Mutual Life Ins. Co.* v. *Johnson*, 254 U. S. 96, 41 S. Ct. 47, 65 L. Ed. 155, made this observation: 'The clause there in question was not a limitation as to coverage. It was a provision for a forfeiture. In case of the suicide of the insured, whether sane or insane, the policy was to be "void".'

"It was upon its face incontestable after one year, coupled with the further condition that it was to be void should the insured 'die by his own hand'. The insured committed suicide, and it was held that there could be a recovery because of the incontestable clause, and not because there was no coverage. Continuing, Judge Cardozo, C. J., said: '*** with such a clause the death of the insured, coupled with the payment of the premiums, will sustain a recovery in the face of a forfeiting condition. It is quite another thing to say that the same facts will prevail against a refusal to assume the risk'.

"*This sound distinction appears in many cases.*

"*Had the policy declared that 'death from suicide is a risk not assumed' a different conclusion would doubtless have been reached. Our application puts death from suicide and death from service on any railway train upon a common footing.*" (159 Va. 851, 852)

Remember that when the Virginia Court used the language which has been last above quoted it was considering

the construction of Section 4228 of the Code. Remember that that section sets out the general rule to the effect that in an action on a life insurance policy "it shall be no defense that the insured committed suicide" and also provides that the insurer may avoid this general rule for a limited period of time by including in its policy "*an express provision . . . . limiting the liability of the insurer.*" Surely the Virginia court must have read this statute before construing it and certainly the terms of that statute must have been clearly in its mind when it quoted from and commented upon *Metropolitan Life Ins. Co.* v. *Conway*, (1930) 252 N. Y. 449, 169 N. E. 642.

It seems to us that under the facts of the Massey case the holding with respect to the defense asserted, to-wit service on any railway train necessarily carries with it a similar holding as to the defense of suicide. The Virginia Court said so in no uncertain terms.

The Virginia Court relied upon the opinion of Judge Cardozo and by doing so expressly held that a suicide clause that makes a policy "void" is not a limitation as to coverage but is a provision for a forfeiture.

What was the decision of the Virginia Court in the Massey case? We insist that it cannot be limited to the question whether an insured engaged in a forbidden occupation or whether he died as a result of an airplane flight prohibited by the terms of the policy or whether he committed suicide. The sole question was the effect of certain language in the policy identical with that contained in the policies here in issue. Did that language have the effect of limiting liability or excluding a certain type of risk? In the first opinion the Virginia court obviously took the same view that the Circuit Court of Appeals has taken in this case and said:

> "The terms of the policy amounted in plain and unambiguous terms to those contemplating the protection of insurance that the issuing company would

> not assume the risks incident to the hazardous occupation of service on railway trains." (159 Va. 843)

Again the Virginia Court said of the policy in the Massey case:

> "The hazards of railway service were never assumed by the company because they were expressly excepted." (159 Va. 848)

As we have already pointed out the holding was "that the risk taken by Proctor in engaging in railroad service was without the coverage of the policy; that the company did not insure his life against such hazards" and, therefore, that the action taken by the company was not a contest. We insist that this is precisely the view of the Circuit Court of Appeals in this case. In so holding the Circuit Court of Appeals has completely ignored the fact that upon the rehearing the Virginia Court held precisely to the contrary. The second opinion as we have pointed out definitely and positively distinguishes the effect of language such as is used in the policies here in question and language which clearly excludes death by suicide or death in a prohibited occupation as a risk not assumed by the insurer. In this respect it is plain that when the Circuit Court of Appeals says that "it is clear, therefore, that the suicide clause whether it provides that the policy shall be void in case of suicide or that suicide is not a risk covered is necessarily a limitation on coverage" (R. 29) its holding is in the teeth of the Virginia Court's opinion on the same subject. However the question may have been decided in other states and however much the rule applied in other states may seem superior to the Federal courts, the rule thus announced by the Circuit Court of Appeals is not in accordance with the Virginia law.

At the risk of being tedious we briefly summarize what we consider was the question decided in the Massey case. We have pointed out that the application provided that if the insured died by suicide or in service on any railway train any agreement under the application should thereupon become *null and void.* In fact there were other conditions

which would void the policy such as death by flight in an airplane, or as a result of a duel, or in violation of a law, etc. or as a result of engaging in blasting, mining, submarine operations, or in the manufacture, handling or transportation of inflammable or explosive substances, or in naval or army service in time of war. (159 Va. 837). We have also pointed out that the policy itself in clause IV definitely bound the insured to most of the provisions set out in the application (159 Va. 832) and in clause VI there was a distinct provision voiding the insurance feature of the contract in the event of the failure of the insured to perform his covenants made in the application or in case of suicide or death in consequence of a violation of the law. These provisions of the application and the policy definitely presented the question of whether the language used had the effect of limiting the liability of the insurer in the cases thus referred to. They definitely raised the question of whether the insurer had excluded the risks mentioned. Not one of them but all of them. Both the application and the policy had definitely provided that in the event of the occurrence of the above mentioned events, the policy should be null and void. If the language used had the effect of either limiting liability or excluding risks then that principle applied to all of the contemplated events and not merely to engaging in service on a railway train, which was directly in issue in the Massey case. The Virginia court held in the second opinion that the language used did not limit liability nor exclude risk. It treated that language as setting up certain conditions subsequent by which a forfeiture of the policies was attempted to be worked. It held that the purpose failed because of the incontestable clause of the policy and the language of Section 4228 of the Code of Virginia. It was manifestly of the opinion that in order to avoid the incontestable clause and the Code section in question the policy must in plain terms expressly limit liability or exclude a risk. That is precisely what the suicide clause of the policies here in issue definitely fails to do and therefore and thereby it comes within the influence and control of the Massey case. It may be true that the construction of the suicide clause by the Circuit Court of Appeals from the viewpoint of general law appears

to that court to be quite superior to the holding of the Supreme Court of Appeals of Virginia in the Massey case. It may be that this court will agree that the rule which the Circuit Court of Appeals has applied in the present case seems superior to it from the viewpoint of general law. Nevertheless, we insist that such a holding is not the Virginia law and is directly in conflict with the direct expression of the Virginia court on the subject. If so both this court and the Circuit Court of Appeals is bound by the Virginia law regardless of whether they agree with it or not.

We, therefore, earnestly contend that in this case the Circuit Court of Appeals has decided an important question of local law in a way probably (and in our humble view certainly) in conflict with applicable local decisions.

POINT B.

The decision of the Circuit Court of Appeals is in conflict with the decision of another Circuit Court of Appeals, Badger v. Hoidale, (C. C. A. 8: 1937), 88 F. (2) 208, 109 A. L. R. 798.

The matter at issue and the decision of said other Circuit Court of Appeals was on the binding effect on Federal Courts of the considered dicta of State Court. The Court in the present case says that: "Plaintiff relies upon a dictum in the case of *United Security Life Ins. & Trust Co.* v. *Massey*, 159 Va. 832, 164 S. E. 529, 167 S. E. 248, 85 A. L. R. 306. That case was one involving a promissory warranty against engaging in a forbidden occupation. The holding was that the incontestability clause forbade a contest based upon breach of this condition. While language was used indicating that this would be the proper holding if breach of condition related to the suicide clause, the mind of the court was not directed to that point and no account was taken of the limitation of coverage necessarily involved in such a clause. The Court apparently assumed, in the language relied on, that suicide merely defeated liability under the policy as upon a condition broken, overlooking the fact that the necessary effect of the suicide clause was to exclude liability in case of suicide." (R. 29).

It will be seen that the Circuit Court of Appeals does admit that the Virginia Court held that a suicide provision as in the instant case did work a forfeiture and was not a limitation of liability. The Court, as stated above, said "the mind of the Court (Va.) was not directed to that point". The petitioner begs to take issue with that statement, for in the two opinions rendered by the Virginia Court there was discussed at length every case that the respondent cited in the Circuit Court of Appeals as to the effect of a suicide clause with the sole exception of Moore v. Bankers Credit Life Ins. Co., 223 Ala. 373, 136 So. 798, and it was only after a thorough consideration of these cases dealing with the suicide clause as a defense that the Virginia Court used its carefully chosen language on the suicide clause and thereafter decided the case before it. Thus, while petitioner does not admit that the Massey case is dicta insofar as its decision should be decisive of this case, yet if it was dicta then surely it was considered dicta.

However, the Circuit Court of Appeals speaking of the Massey case says:

> "But we would not feel bound to follow it in any event. We recognize, of course, our duty to ascertain and apply the law of Virginia to the facts of the case; but mere dicta have never been received as conclusive evidence of the law of any state, and clearly they ought not be followed when opposed to what we regard as the sound and reasonable rule arising out of the common law of the state." (R. 31).

We think that by this language the Circuit Court of Appeals ignored the opinion of Judge Wheeler in *National Bank of Oxford* v. *Whitman*, (N. Y. D. C.; 1896) 76 F. 697, when in discussing the effect of a certain decision of the Supreme Court of Kansas he said:

> "That the construction of the constitutions and statutes of states by their tribunals is binding is not questioned, but this declaration is said to be so far merely obiter as not to be authoritative. The question

whether the action is transitory, and could be maintained without the state, was not directly in judgment; *but it was so before the court, in construing the provisions of the constitution and statutes together, that it appears to have received full consideration.* The opinion of the court upon it is entitled to great weight elsewhere." (76 F. 698) (Italics are ours.)

This case was considered on appeal by the Circuit Court of Appeals for the Second Circuit, 84 Fed. 288 (C. C. A. 2: 1897) and the Supreme Court of the United States, 176 U. S. 559, 20 S. C. A. 477, 44 L. Ed. 587 (1900) and neither of these courts criticised the above quotation from Judge Wheeler's opinion.

But still more important, it seems to us that the excerpt quoted from the opinion of the Circuit Court of Appeals in the present case is in the teeth of the holding of the Circuit Court of Appeals for the Eighth Circuit in *Badger* v. *Hoidale,* (C. C. A. 8: 1937), 88 F. (2) 208, 109 A. L. R. 798, when that court commented upon a certain opinion of the Supreme Court of Minnesota as follows:

"(2-6) This was probably dictum. But the interpretation and construction of the Constitution of a state is peculiarly within the province of the highest court of the state, and its construction will be followed by the national courts. *Blue Valley Creamery Co.* v. *Consolidated Products Co.* (C. C. A. 8) 81 F. (2d) 182. *Considered dictum of that court should not be ignored when a federal court is attempting to construe or ascertain the meaning of the local law,* whether it be the state statute or the State Constitution. *Blue Valley Creamery Co.* v. *Consolidated Products, Co.,* supra; *Hawks* v. *Hamill,* 288 U. S. 52, 53 S. Ct. 240, 77 L. Ed. 610." (88 F. (2) 211.) (Italics are ours.)

We insist that the Circuit Court of Appeals for the Fourth Circuit has while attempting to construe or ascertain the meaning of Virginia law completely ignored the considered dictum of the Virginia Court which clearly shows

the viewpoint of that court on the question involved. In this respect its holding is directly contra to that of the Eighth Circuit.

POINT C

The decision of the Circuit Court of Appeals in the present case is in conflict with that of the Supreme Court of the United States on an important question of Federal law, to-wit: The deference which is due to a local court on a local question of law even though the language of the lower court be considered dictum and something less than a decision.

The question here involved is, of course, quite like that presented in Point B. It will be observed that Judge Parker, speaking for the Circuit Court of Appeals, in justification of its refusal to be bound by the language of the Massey case cites *Carroll* v. *Carroll*, (1853) 57 U. S. 275 (16 How. 275) 14 L. Ed. 936. (R. 31). He completely ignores *Hawks* v. *Hamill*, (1933), 288 U. S. 52, 53 S. C. R. 240, 77 L. Ed. 610. In the last mentioned case this court had under consideration the construction of a provision of the constitution of Oklahoma and the weight and effect of decisions construing that provision by the Supreme Court of that state. The point was made that the Oklahoma decisions were dicta. The Supreme Court met the issue squarely in an opinion by the lamented Mr. Justice Cardozo. We quote from that opinion as follows:

> "We do not now determine what meaning we would give to the Oklahoma Constitution if the question were before us as an original one, unhampered by any pronouncement of the courts of that state. Much can be said in support of the respondents' position that the perpetuities denounced are those arising from the creation of future estates or from restraints upon alienation without reasonable limit. The question is one distinctively local in origin and content." (288 U. S. 56, 57.) * * *

"We are urged by the respondents to exert a power of independent judgment though the law to be interpreted be a constitution or a statute, and not merely the form of law which has come to be spoken of as general." (288, U. S. 57, 58.) * * * *

"Obedience is due to the courts of the state if the decisions claiming fealty are so many and unequivocal as to make out a 'rule of property.' *Edward Hines Yellow Pine Trustees* v. *Martin*, supra, at pp. 463, 464. As to this there is no denial. The argument is that the fetters of obedience are released when there is only a single state decision, and this subsequent to the transaction out of which rights and duties have developed." (288 U. S. 58) * * *

"Choice is not so free as the argument assumes. If the single decision interpreting a constitution or a statute is clear and unequivocal, submission to its holding has developed in these days into a practice so nearly uniform that there is little need to consider whether under pressure of extraordinary circumstances there is a privilege to deviate. Whatever doubt as to the practice may have prevailed in days gone by has been dispelled by recent judgments. *Chicago, M. & St. P. & P. R. Co.* v. *Risty*, 276 U. S. 567, 72 L. Ed. 703, 48 S. Ct. 396, supra; *Sioux County* v. *National Surety Co.*, 276 U. S. 238, 72 L. Ed. 547, 48 S. Ct. 239, supra. *Indeed the radiating potencies of a decision may go beyond the actual holding. A wise comity has decreed that deference shall at times be owing, though there may be lacking, in the circumstances, a strict duty of obedience.* Cf. *Sim.* v. *Edenborn*, 242 U. S. 131, 135, 61 L. Ed. 199, 203, 37 S. Ct. 36. *An opinion may be so framed that there is doubt whether the part of it invoked as an authority is to be ranked as a definitive holding or merely a considered dictum.* What was said in *Okmulgee* v. *Okmulgee Gas Co.*, 140 Okla. 88, 282 Pac. 640, supra, as to the meaning of perpetuities was probably intended to be a definitive holding. Cf. 141 Okla. 98, 284 Pac. 70; 141 Okla. 100, 284 Pac. 12. To be sure there is room

> for argument that limiting distinctions will have to be drawn in the future. We must leave it to the courts of Oklahoma to declare what they shall be. But *the result will not be changed though the definition of perpetuities be something less than a decision. At least it is a considered dictum, and not comment merely obiter.* It has capacity, though it be less than a decision, to tilt the balanced mind toward submission and agreement." (288 U. S. 58, 59.) (Italics are ours.)

We insist that the decision of the Circuit Court of Appeals in the present case is in the teeth of the rationale and holding in *Hawks* v. *Hamill*, supra.

POINT D

The Circuit Court of Appeals has refused to follow the mandate of this court "to ascertain from all the available data what the state law is and apply it rather than to prescribe a different rule however superior it may appear from the viewpoint of general law".

West v. *American Telephone & Telegraph Company*, (1940) U. S. , 61 S. C. R. 179, 85 L. Ed. (Adv. Opinions) 147.

The opinion of the Circuit Court of Appeals in the present case clearly shows that that court has refused to follow what it calls the dictum in the Massey case because it is "opposed to what we regard as the sound and reasonable rule arising out of the common law of the state." (R. 31).

Here it seems to us that the distinguished Circuit Judge who wrote the opinion below completely loses sight of the fact that the common law of Virginia with respect to the question at issue is in no wise material to this cause. It is quite true that *Security Life Insurance Co. of America* v. *Dillard*, 117 Va. 401, 84 S. E. 656, held that there could be no recovery on a life insurance policy in case of suicide. That case was decided March 11, 1915. At the very next succeeding session of the General Assembly the rule thus

laid down was abrogated by Chapter 99 of the Acts of the Virginia Assembly of 1916 which was the forerunner of Section 4228 of the Code of Virginia in its present form. The trial court based its decision upon Section 4228 of the Code of Virginia and in the construction of that section by the Supreme Court of Appeals of Virginia in the Massey case, supra. If the Circuit Court of Appeals has attempted to decide this case upon what it concedes to be the common law of Virginia, it has plainly missed the crucial and controlling point which is involved. We insist that the Circuit Court of Appeals is bound by the statute law of Virginia and where by statute a common law rule has been abrogated it must follow the statute and not the common law. Moreover, it is bound by the construction of a statute by the appellate court of the state in question.

It is true that the Circuit Court of Appeals cites *Darden* v. *North American Benefit Association*, (1938) 170 Va. 479, 197 S. E. 413, to sustain its position but as we see it that case involved a clear question of limitation of liability in express language and not a forfeiture as is provided by the policies here in question. We insist that the only evidence of any applicable "rule arising out of the law of the state" of Virginia is found in the opinion in the Massey case. We further insist that in the light of the exhaustive consideration which the Virginia court gave to suicide defense cases, it is inaccurate to say as Judge Parker says that "the mind of the (Va.) court was not directed to that point and no account was taken of the limitation of coverage necessarily involved in such a clause (suicide clause)". (R. 29). It is further inaccurate to say as Judge Parker did say that "the (Va.) court apparently assumed in the language relied on that suicide merely defeated liability under the policy as upon a condition broken overlooking the fact that the necessary effect of the suicide clause was to exclude liability in case of suicide". (R. 29).

We insist that the Virginia Court did not overlook the effect of the suicide clause. On the contrary it held that if there was such language as plainly excluded suicide as a risk then in such case the clause was an effective defense,

but that when an insurer used the language which is present in the policies here involved such language worked a forfeiture, reliance upon the same involved a contest and, therefore, the incontestable clause and the statute took precedence and defeated such a defense. It is our view that certainly the Massey case is "available data" from which may be ascertained the law of Virginia and in such event it is the duty of the Circuit Court of Appeals for the Fourth Circuit to apply the law as thus ascertained "rather than to prescribe a different rule however superior it may appear from the viewpoint of general law." We think this is the holding of *West* v. *American Telephone & Telegraph Company*, (1940) U. S. , 61 S. C. R. 179, 85 L. Ed. (Adv. Opinions) 147. In that case Mr. Justice Stone states the question presented as follows:

> "The Circuit Court of Appeals in this case, in which jurisdiction rests exclusively on diversity of citizenship, declined to follow the ruling in West v. American Teleph. & Teleg. Co., 54 Ohio App. 369, 7 NE (2d) 805, 7 Ohio Ops. 363, of the Cuyahoga County Court of Appeals, an intermediate appellate court of Ohio. The question for decision is whether, in refusing to follow the rule of law announced by the state court, the court below failed to apply state law within the requirement of paragraph 34 of the Judiciary Act of (September 24) 1789, 1 Stat. at L. 92, chap. 20 and of our decision in Erie R. Co. v. Tompkins, 304 U. S. 64, 82 L. Ed. 1188, 58 S. Ct. 817, 114 A. L. R. 1487." (85 L. Ed. Adv. Opinions 147)

There was no Ohio statute, nor any decision of the Supreme Court of Ohio determinative of the point involved. As indicated in the above-quoted excerpt, there was a decision by an intermediate appellate court which was directly in point. The Circuit Court of Appeals for the Sixth Circuit held that this decision was not binding on the federal courts. The Supreme Court reversed that decision, holding that the federal trial court, sitting in Ohio, was bound by the decision of the intermediate appellate court, and was "not free to apply a different rule, however desirable

it may believe it to be, and even though it may think that the state Supreme Court may establish a different rule in some future litigation".

In reaching its conclusion, the Court indulges in certain reasoning which we regard as most helpful to this Court in reaching its decision on the petition here presented. We quote that language as follows:

> "But the obvious purpose of paragraph 34 of the Judiciary Act is to avoid the maintenance within a state of two divergent or conflicting systems of law, one to be applied in the state courts, the other to be availed of in the federal courts, only in case of diversity of citizenship. That object would be thwarted if the federal courts were free to choose their own rules of decision whenever the highest court of the state has not spoken.
>
> "*A state is not without law save as its highest court has declared it. There are many rules of decision commonly accepted and acted upon by the bar and inferior courts which are nevertheless laws of the state although the highest court of the state has never passed upon them.* In those circumstances *a federal court is not free to reject the state rule merely because it has not received the sanction of the highest state court, even though it thinks the rule is unsound in principle* or that another is preferable. *State law is to be applied in the federal as well as the state courts and it is the duty of the former in every case to ascertain from all the available data what the state law is and apply it rather than to prescribe a different rule, however superior it may appear* from the viewpoint of 'general law' and however much it may have departed from prior decisions of the federal courts. See Erie R. Co. v. Tompkins, supra (304 U. S. 78, 82 L. Ed. 1194, 58 S. Ct. 817, 114 A. L. R. 1487); Russell v. Todd, supra (309 U. S. 293, 84 L. Ed. 762, 60 S. Ct. 527)." (85 L. Ed. Adv. Opinions 150) (Italics are ours.)

It seems to us that the Circuit Court of Appeals has completely ignored this mandate of the Supreme Court of the United States.

POINT E

In any event it is desirable that the Supreme Court of the United States shall determine (if it has not already determined) the extent to which a Federal court in determining questions of local law is bound by considered dicta of local courts and to what extent such Federal courts may rely upon such considered dicta as available data for the purpose of determining local law.

The argument which we have made under Points C and D seem quite sufficient to indicate the necessity and desirability of a definite decision by this court of the above stated questions in the event that we have misapprehended the meaning and effect of the decisions which we have cited and quoted from in those two branches of our argument which as we see it have already decided the questions. We do not deem any further comment necessary upon this point.

Conclusion

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, by granting a writ of certiorari and thereafter reviewing and reversing said decision.

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